from denying that he received a true copy. Having admitted signing a receipt for a true copy on the back of the promissory note which he admits he executed he cannot now be heard to deny that a true copy of the note was given to him. Even to the uninitiated in the science of handwriting the signature below the receipt on the back appears to be the same hand as that which signed the promissory note as borrower. And that so called true copy was in fact a duplicate original not a mere copy.

On this evidence the learned judge held that there was no evidence from which to infer that the copy which was alleged to have been delivered to the defendant had been authenticated in the manner required by section 16(1) of the Moneylenders Ordinance, 1951. The learned judge considered the case to be on all fours with the facts in *Ang Khye Pang* v. *Chop Ban Aik.*[3]

It seems to me, however, that the learned judge failed to appreciate that what is here alleged is that what the borrower was given was not a mere copy of the note or memorandum of the contract but a duplicate original note. This it seems to me is the important respect in which this case differs from the *Ang Khye Pang* case and the other cases which have followed it.

If the evidence for the plaintiff is accepted what was delivered to the borrower was something more than section 16(1) of the Ordinance requires. The borrower was given an original document made by himself and bearing his own signature upon it and not a mere copy authenticated by the lender. This original document was executed by the borrower in the presence of P.W.1 who is an advocate and solicitor and as such an officer of the court. The word "authenticate" means "to establish the genuineness of". Surely by placing his signature on the document in the presence of the person who attested the borrower's signature the lender has established the genuineness of the document beyond peradventure.

Can it seriously be argued that in a case such as this where the promissory note was executed in duplicate, if the lender had delivered the original note, i.e. the executed top copy, and retained the executed bottom copy, he could not enforce the contract because what had been given to the borrower was not a copy authenticated by the lender but the original. And to take it logically a step further if the borrower had been given the executed top copy on which the lender had written some words stating it to be authenticated by him and had then signed his name below those words that that was not a compliance with section 16(1) because what the borrower got was the original and not a copy.

I find myself unable to accept such reasoning and I am of opinion that where, as is alleged in this case, the borrower has been given a duplicate original document the requirements of section 16(1) would be sufficiently complied with and clearly the mischief which the law was designed to prevent would be prevented. In my opinion the addition of the words of authentication by one of the signatories could add nothing to the authenticity of the document. It would be as sensible to require that an original document be certified by a party to it to be a true copy of itself — such a certificate would be valueless and false.

In my opinion, therefore, the appeal should be allowed and the case remitted to the High Court for re-trial. The costs of the trial of this issue and of this appeal to be costs in the cause.

Azmi C.J. (Malaya) and **Yong J.** concurred.

Appeal allowed.

Solicitors: *Jayadeva, Zahir & Ismi; Goh Eng Kee & Co.*

RATNA AMMAL v. TAN CHOW SOO

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) March 2, 1967]

[Penang — Federal Court Civil Appeal No. X.55 of 1966]

Bills of exchange — Cheque — Plea that cheque was given for illegal consideration — Barter trade — Bills of Exchange Act, 1882, s. 30(2).

Evidence — Standard of proof required where fraud or conspiracy is alleged — Evidence Ordinance, 1950, s. 10.

This was an appeal by the plaintiff against the decision of the High Court, reported in [1966] 2 M.L.J. 294.

The plaintiff brought an action to recover from the defendant as drawer of a cash cheque for $50,000 which she alleged the defendant gave in exchange for several loans made by her to him. The defendant admitted having drawn the cheque but pleaded that it was given for an illegal consideration. He alleged that the plaintiff's son, who was employed in the Foreign Exchange Control Department, was to assist in getting licences for the export of goods to Indonesia and in return the defendant gave the cheque as part of the payment to be shared by a syndicate consisting of the plaintiff's son, the staff of the Indonesian consulate in Penang and an intermediary.

The trial judge held that on the evidence the defendant had proved that the cheque was given to the plaintiff's son and that at the time it was given it was tainted with illegality and therefore void and as the plaintiff had failed to prove that subsequent to the illegality, value had been given in good faith for the cheque, the claim must be dismissed. The plaintiff appealed.

Held: in the circumstances of the case there was no evidence to conclude that the defendant had proved the cheque had been given for an illegal consideration. Therefore the appeal must be allowed.

Cases referred to:—

(1) *Bater* v. *Bater* [1951] P. 35.

(2) *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173.

FEDERAL COURT.

R. R. Chelliah for the appellant.

C. C. Lim for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Penang dismissing the appellant's claim against the respondent for $50,000 as a drawer of a cheque countermanded by the respondent.

The respondent admitted he was the drawer of the cheque Exh. P.1A but alleged that the cheque was given to one Mahalingam Ratnavale for an illegal consideration, namely in consideration of a promise by the said Ratnavale to obtain official approval in the export of goods to Indonesia.

On the above pleadings the burden of proof was therefore upon the respondent to prove that the cheque was so affected by illegality.

In his evidence the respondent stated that he was in business as an importer and exporter of goods, trading under the name of Chop Soo Seng. He exported goods to Sumatra and this business was done by barter but he held these barter rights in the name of another firm known as Chop Guan Cheong, which barter rights were according to him worth over a million dollars. To make use of these barter rights it was necessary to obtain a licence to export the goods from this country to Indonesia from the Malayan Controller of Foreign Exchange. Through the initiative of a mutual friend Lee Yim Wah D.W.2, respondent met Ratnavale about the end of July or beginning of August 1960 in a Government quarters occupied by Ratnavale.

The meeting of these three persons resulted in an agreement being made between them namely that Ratnavale and his group would obtain the necessary licence on a promise by the respondent to give them 75% of the barter rights possessed by Chop Guan Cheong and as a security for his part of the bargain the respondent gave a cheque Exh. P.1A for $50,000 to Ratnavale through Lee Yim Wah on 19th January 1961. The cheque was a cash cheque and was not then dated and according to respondent, Ratnavale was to hold the cheque and not to make use of it without his previous permission. Subsequently, the date 24th January 1961 was inserted on the cheque and it was countermanded by the respondent by letter dated 5th July 1963. The respondent explained that he countermanded the cheque because he and Ratnavale had differences of opinion. But, however, he admitted that the barter rights had already been sold between 19th January 1961 and May or June 1961 by Lee Yim Wah in Singapore and according to his affidavit by the time he disposed of the barter rights for $117,946.60 he had paid various sums totalling $20,500 to Ratnavale and that Ratnavale failed to return the cheque although he made frequent and repeated requests for it. (See paragraph 5 of respondent's affidavit dated 5th August 1963).

He was also cross-examined in reference to the following cheques: Exh. D.4 for $3,000, Exh. D.5 for $9,000, Exh. D.6 for $25,000 and Exh. D.7 for $15,000. He denied however, previously seeing D.4 or D.5. He admitted however, that D.6 was paid into the account of Chop Soo Seng. He also denied that the appellant gave him Exh. D.7. He denied also that Exh. P.1A was given in consideration of the cheques D.5, D.6 and D.7 and cash of $1,000 on 13th January 1961. He admitted what he had at his bank at that time was merely overdraft facilities up to $180,000. Incidentally it would be apparent from Exh. P.11 — statement of account that on the 20th January 1961, respondent's overdraft amounted to $188,788.05. He had, therefore, exhausted his overdraft facilities.

D.W.2 Lee Yim Wah, said that he had known Ratnavale for a number of years. He said that he gave cheque P.1A to Ratnavale on the understanding that Ratnavale was not to pay it into his bank or use it without respondent's prior consent. He more or less corroborated respondent's story as to how Ratnavale and respondent came to the agreement in reference to the barter rights and that the cheque P.1A was given as security. He also said that the barter rights were sold in July 1961 in Singapore and the permit was granted by the controller at Kuala Lumpur in May 1960, but stated that the amount of $20,500 paid to Ratnavale had nothing to do with P.1A. Lee admitted signing the statutory declaration Exh. D.10. In that declaration Lee Yim Wah D.W.2 referred to paragraph 5 of respondent's affidavit which dealt with the facts relating to the conspiracy, denying (1) he saw the defendant, (2) he acted as agent of Ratnavale or (3) that Ratnavale could or would use his influence to act in a manner set out in the said paragraph 5. He explained that the affidavit was intended to facilitate Ratnavale to sue the respondent but further stated that the contents were false and he knew that they were false. He finally stated that not only what he swore in Exh. P.10 was false but that he did not understand its contents.

D.W.3 Koay Teik Choon who wrote out the cheque Exh. P.1A, stated that he did so on 19th January 1961 which he noted on the butt of the cheque. With reference to cheque Exh. D.4 he said that Ratnavale gave it to him to cash at the bank.

D.W.4 Lee Kim Seng stated that cheque P.5 was given to him by Ratnavale to cash and similarly with cheque Exh. P.7.

In her evidence appellant stated that she gave exhibits D.4, D.5, D.6 and D.7 and $1,000 cash as a loan and in exchange for these the

respondent gave her a cheque Exh. P.1A.

There are several grounds of appeal. I will first deal with those which in my view have no substance.

One of these ground was that the learned judge had misdirected himself as to the nature of the burden of proof on the respondent on the question of whether the cheque in question was tainted with illegality. On this point the learned judge referred to this burden as "of a higher degree of probability". I have no doubt that the learned judge had in mind a passage in the judgment of Lord Justice Denning in *Bater* v. *Bater* [1] which reads as follows:—

"In criminal cases the charge must be proved beyond reasonable doubt but there may be degrees of proof within that standard. As Best C.J. and many other great judges have said 'in proportion as the crime is enormous, so ought the proof to be clear.' So also in civil cases the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it does require a degree of probability which is commensurate with the occasion."

Rose C.J. in *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [2] after citing the above judgment of Lord Denning and that of Morris L.J. which referred to the judgment of Denning L.J. which I quoted *in extenso*, stated:—

"Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged."

For myself I would therefore say that the learned trial judge in referring to the burden of proof as that of a higher degree of probability has not misdirected himself.

Another ground of appeal was that the learned judge on the question of illegality, referred to a law which at the time of the alleged act had not been brought into force. In my view however, a conspiracy to offer a Government servant gratification other than a legal remuneration as a motive or reward for doing an official act in exercise of his official functions is an offence under the Penal Code.

Another ground was that an alleged statement by Ratnavale as related in court by the respondent and Lee Yim Wah D.W.2 was not relevant evidence, since Ratnavale was not called as a witness nor was he a party to the suit. In my view, however, that what Ratnavale stated or did, being, as alleged to be in reference to their common intention in the conspiracy are relevant under section 10 of the Evidence Ordinance. When concert and connection between the persons alleged to be in the conspiracy have been sufficiently established, the statements, acts or declarations of each conspirator in reference to their common intention are admissible as evidence against the others.

In my view, there are however, two substantial grounds.

One was the failure of the learned trial judge to consider adequately the fact that Ratnavale had left the Government service on the 19th July 1960. According to respondent he met Ratnavale the first time in connection with the alleged conspiracy about the end of July or the beginning of August 1960 at about 3 or 4 p.m. About that time Ratnavale had ceased to function as assistant controller. Lee Yim Wah also stated that he took respondent to Ratnavale's house the first time in connection with this matter about July or August. On this point the learned trial judge disposed of this apparent discrepancy by stating as follows:—

"In my view I cannot read the paragraph as disclosing a transaction that occurred on one single day. To succumb to that temptation would be to ignore reality."

I confess I am unable to understand what the learned trial judge meant.

It is also unfortunate that no evidence was given by respondent as to when the necessary licence or licences in connection with this matter were issued by the Controller of Foreign Exchange.

Another ground of appeal which might be considered now and in my view important in considering the previous point was as to the evidence of Lee Yim Wah. Lee swore a statutory declaration in which he said that what the respondent stated in his (respondent's) affidavit was not true. The relevant part of respondent's affidavit (paragraph 5) gave the facts of the alleged conspiracy and referred to the part in that conspiracy taken by Lee Yim Wah. It was this matter which Lee Yim Wah in his statutory declaration denied. But at the trial Lee Yim Wah corroborated what was alleged in paragraph 5 of respondent's affidavit in reference to the conspiracy. He explained that what he stated in his statutory declaration was not true and in fact he said he did not know what were the contents of the declaration.

In reference to this matter the learned judge stated as follows:—

"In my view that declaration was made in contemplation that he (Lee Yim Wah) would not be made available as a witness in the present case. Since he was a witness in the present case his declaration may only be used as a previous statement. In the light of his explanation I have therefore to consider his whole evidence with caution."

In my view the learned judge misdirected himself here. In my opinion if a witness made two contradictory statements on the same matter

he must be held to perjure himself unless perhaps he could satisfy the court that there was compulsion or duress in the making of one. Therefore his evidence on this matter should be totally disregarded. It was in reference to the rest of his evidence which could still be considered, but with caution. So that in my view, the evidence of Lee Yim Wah in reference to the alleged conspiracy must be totally disregarded with the result that the court was left to consider on the uncorroborated evidence of the respondent alone.

In considering the respondent's version of the story, the learned judge appeared to consider as cogent piece of evidence in favour of him, the fact that he had bigger overdraft facilities than that enjoyed by the appellant. We know that is wrong because as I have pointed out previously the respondent had practically exhausted his overdraft facilities on 20th January 1961. And again there is some doubt as to whether on the date when the meeting took place, Ratnavale was still in office or not, and enjoyed the necessary influence. In the circumstances, I would come to the conclusion that the respondent had failed to prove his case. I would therefore allow the appeal and direct that judgment be entered in favour of the appellant for $50,000 and interest at the rate of 6% per annum from the date of the writ until satisfaction. The respondent will pay the costs of this appeal and the costs in the court below.

Yong J. concurred.

Pike C.J. (Borneo): I have had the advantage of reading the judgment of the learned Chief Justice, Malaya, with which I find myself in substantial agreement. In only one respect do I differ from him. I have come to the conclusion that the learned judge misdirected himself as to the standard of proof required in a case such as this where fraud and criminal conspiracy was pleaded.

While the learned judge did use the expression at page 3 (page 75 of the record) of his judgment "a higher degree of probability" it seems to me that in the context in which it is used it means no more than a favourable balance of probability. When one speaks of a court having to be satisfied on a balance of probability one means that the higher degree of probability favours the conclusion since, if the probabilities were equally balanced, the court would not have been satisfied on a balance of probability. That this was all that can be read into those words "a higher degree of probability" seems strongly supported by the learned judge's further findings at page 28 of his judgment (page 100 of the record) where he says "Having reviewed the evidence as a whole, I am satisfied that on the balance of probability as is required to be proved in a case of this nature, the defendant has substantiated his claim that the cheque was given to Ratnavale and that at the time it was given it was tainted with illegality and is therefore void."

I am further reinforced in my opinion by an examination of the evidence upon which the learned judge could have been so satisfied. The defendant is a self-confessed rogue and his principal witness Lee Yim Wah, and the only witness as to the conspiracy, is a self-confessed rogue and perjurer. The defendant's evidence was self-serving in revealing a criminal conspiracy which had occurred some two years previously and the existence of which would never have been brought to light if it had been possible by any other means to defeat the plaintiff's claim on the cheque and it must, therefore, be viewed with the utmost caution and Lee Yim Wah's evidence must be wholly rejected.

What does this leave by way of reliable evidence on which any court properly directed could be satisfied of the existence of this criminal conspiracy? The answer clearly is that it leaves insufficient to find in the defendant's favour even on a bare balance of probabilities.

In my opinion, on this ground alone the appeal should be allowed and I concur in the order which my brother Azmi would make.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Lim, Lim & Oon.*